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FADZIL AWANG KECHIK v. MENTERI SUMBER MANUSIA & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
HANIPAH FARIKULLAH J
[JUDICIAL REVIEW NO: WA-25-95-05-2016]
B 16 JUNE 2017

ADMINISTRATIVE LAW: *Judicial review – Certiorari – Application to quash Minister's decision not to refer representations to Industrial Court – Forced resignation – Whether there was constructive dismissal – Whether applicant's representation frivolous, perverse and vexatious – Whether Minister overstepped jurisdiction by rejecting applicant's representation on merits – Whether applicant's acceptance of compensation prevented or barred him from seeking remedy of reinstatement from Industrial Court – Whether Industrial Court the appropriate forum to make fair and appropriate decision – Industrial Relations Act 1967, s. 20(3)*

D

LABOUR LAW: *Industrial Court – Reference by Minister – Minister's refusal to refer representations to Industrial Court – Judicial review – Application for – Forced resignation – Whether there was constructive dismissal – Whether applicant's representation frivolous, perverse and vexatious – Whether Minister overstepped jurisdiction by rejecting applicant's representation on merits – Whether applicant's acceptance of compensation prevented or barred him from seeking remedy of reinstatement from Industrial Court – Whether Industrial Court the appropriate forum to make a fair and appropriate decision – Industrial Relations Act 1967, s. 20(3)*

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LABOUR LAW: *Employment – Forced resignation – Whether there was constructive dismissal – Application to quash Minister's decision not to refer representations to Industrial Court – Whether applicant's representation frivolous, perverse and vexatious – Whether Minister overstepped jurisdiction by rejecting applicant's representation on merits – Whether applicant's acceptance of compensation prevented or barred him from seeking remedy of reinstatement from Industrial Court – Whether Industrial Court the appropriate forum to make fair and appropriate decision – Industrial Relations Act 1967, s. 20(3)*

The applicant commenced employment with the second respondent on 21 April 1986. After 29 years, on 26 March 2015, the applicant alleged that he was forced to resign as the Manager of the Bernas Careline by being forced to accept optional retirement by his superiors. The applicant contended that his superiors had exerted extreme pressure on the applicant by continuously asserting and alluding that the applicant would be dismissed from his employment. The applicant was referred to the Head of Internal Audit, one Normala Hassan, to conduct an audit on the work performance and quality of the applicant's work, and was informed that his job performance was satisfactory. However, the applicant contended that the victimisation and the

continuous threats and allegations against the applicant did not stop, thus he applied for a transfer to a different apartment and had managed to obtain the support of the head of the department. However, his request for transfer was denied by his superior one Rosli Sharif who had asked him to resign. He was then offered an alternative by one Ghaus Omar that he should apply for his optional retirement which he was entitled to by virtue of his employment contract and with his long service. The applicant then had no other option in view of the cumulative pressure placed on him and handed his letter of resignation applying for optional retirement with three months' notice. This was however rejected by Rosli Shariff. Thus, the applicant prepared another letter requesting for immediate termination on 27 March 2015 with his last date being 31 March 2015 which was after four days. The applicant subsequently wrote to the second respondent highlighting the action of his superiors and requested for reinstatement and that he was willing to return the retirement benefit payment of RM210,279.10 received if reinstated, which was rejected by the second respondent. The applicant then made his representation to the Industrial Relations Department. The Minister, however, decided that the matter should not be referred to the Industrial Court. Aggrieved by the decision of the first respondent, the applicant commenced this action for judicial review to seek an order of *certiorari* and *mandamus* to quash the said decision. The issues that arose were (i) whether the Minister had failed to appreciate and had misinterpreted the law that the applicant's representation was premised on forced resignation which was a constructive dismissal; (ii) whether the applicant's representation was perverse, frivolous and vexatious; (iii) whether the Minister failed to take into account all relevant facts; and (iv) whether the retirement benefit payment of RM210, 297.10 prohibited the applicant's representation to be referred to the Industrial Court.

Held (allowing application):

(1) Whether an employee is constructively dismissed is a question of law which is not the province of the Minister to decide. The Industrial Court is the best venue to decide this question. In the proper exercise of his discretion, the Minister ought to have referred the representation to the Industrial Court to decide on its merits. Therefore, the Minister had failed to fully appreciate the scope of his discretion under s. 20(3) of the Industrial Relations Act 1967, when he declined to refer to the Industrial Court. This ground alone was sufficient to allow this application as the Minister had clearly overstepped his jurisdiction by making a finding to reject the representation on merits. (paras 29 & 30)

(2) The applicant was employed with the second respondent a total of 29 years. Prior to the incidents of 2015, the applicant had fully and diligently discharged his duties as the second respondent's employee. There was no affidavit in reply by his superiors to dispute the allegation of pressure and coercion by them. There was a dispute on the question

of fact whether the applicant had resigned voluntarily or was it a forced resignation. These disputed matters were certainly not frivolous and vexatious and were not within the purview of the Minister to decide. (paras 31-34)

(3) The Minister had failed to take into account these relevant facts (i) that the applicant had applied for a transfer out of the department as the manager of Bernas Careline which was denied; (ii) that the applicant was subjected to internal audit with Normala Hassan of Bernas Internal Audit and was informed that there was no problem with his employment and that he was cleared from any allegation of wrongdoing; and (iii) that there were two letters of resignation within twenty four hours which clearly showed the resignation was coerced and that the applicant was forced to terminate his employment within four days after 29 years of service. (para 35)

(4) The applicant's acceptance of the compensation from the second respondent did not in any way prevent or bar him from seeking the remedy of reinstatement from the Industrial Court (*Swedish Motor Assemblies Sdn Bhd v. Haji Mohd Ison Baba*, refd). The first respondent should not replace the position of the Industrial Court to evaluate the merits of the representation but only to consider whether the representation was perverse, frivolous or vexatious. It is the Industrial Court who is clothed with the jurisdiction and power to hear and adjudicate the reference and being a court of equity and good conscience, is the appropriate forum to hear the evidence of all the parties and make a fair and appropriate decision. (paras 39-41)

Case(s) referred to:

Harpers Trading (M) Sdn Bhd lwn. Lee Fook Kiong & Yang Lain [2006] 1 CLJ 289 CA ***(refd)***

James Clement Hii Gin Kion v. Menteri Sumber Manusia & Anor [2015] 3 CLJ 234 HC ***(refd)***

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***

Swedish Motor Assemblies Sdn Bhd v. Haji Mohd Ison Baba [1998] 3 CLJ 288 CA ***(refd)***

The Hon Minister For Human Resources v. Thong Chin Yoong & Another Appeal [1999] 4 CLJ 161 CA ***(refd)***

Zainon Ahmad & Ors v. Padiberas Nasional Bhd [2012] 8 CLJ 29 FC ***(refd)***

Legislation referred to:

Industrial Relations Act 1967, s. 20(3)

For the applicant - Harjinder Singh & Premjit Singh; M/s Prem & Assocs
For the 1st respondent - Mohd Farid Mohd Mokhtar; FC
For the 2nd respondent - Rutheran Sivagnanam; M/s The Chambers of R Sivagnanam & Assocs

Reported by Suhainah Wahiduddin

JUDGMENT

Hanipah Farikullah J:

Introduction

[1] The applicant, who is aggrieved with the decision of the first respondent, is commencing this action for judicial review, among others, to seek an order o*f certiorari* and *mandamus* to quash the decision of the first respondent *vide* the letter dated 20 January 2016 not to refer the applicant's presentation to the Industrial Court and for this court to direct the matter be referred to the Industrial Court.

The Applicant's Case

[2] The facts leading to this application are as follows.

[3] The applicant had commenced his employment with the second respondent on 21 April 1986 and when the predecessor Lembaga Padi and Beras Negara ("LPN") was privatised on 5 June 1994, the applicant accepted the offer to continue his employment with the second respondent.

[4] The application before his termination was employed as Manager Bernas Careline and at the material time was employed nearly 29 years with the second respondent.

[5] On 26 March 2015, the applicant alleged that he was forced to resign as the manager of the Bernas Careline by being forced to accept optional retirement by his superiors.

[6] The applicant contended that his superiors had exerted extreme pressure on the applicant by continuously asserting and alluding that the applicant would be dismissed from his employment.

[7] The applicant asserted that before En Rosli Shariff, Pengurus Besar Kanan, Jabatan Modal Insan dan Pentadbiran had commenced his employment with the second respondent and as the superior of the applicant (February 2015), he had a good employment record with the second respondent.

[8] After En Rosli Shariff has taken over supervision of his department, the applicant had been placed under enormous and considerable stress wherein the applicant had been consistently questioned on his work performance without any basis and was subjected to psychological pressure by numerous allegations, comments and accusation made by En Rosli Shariff and En Ghaus bin Omar.

[9] The consistent mental and psychological pressure placed on the applicant made the applicant consistently doubt himself and placed him in deep fear of losing his job without the benefits due to him from his long employment with the respondent.

[10] The applicant was victimised by the action of his superiors and had his livelihood threatened as they had pressured him that he would either be dismissed summarily or subjected to disciplinary action with eventual dismissal.

[11] The applicant was then instructed to be referred to the head of internal audit, Ms Normala Hassan, to conduct an audit on the work performance and quality of the applicant's work.

[12] However, after the audit was concluded, he was informed by Ms Normala Hassan that his job performance is satisfactory.

[13] Further, the applicant contended that the victimisation and the continuous threats and allegations against the applicant did not stop and all his decision were repeatedly questioned by his superiors and placed under enormous stress by both Mr Rosli Shariff and En Ghaus bin Omar.

[14] Thus, the applicant said he could no longer bear the pressure and applied for a transfer to a different department in Port Klang and had managed to obtain the support of the head of the department.

[15] However, his request for transfer was denied by his superior and En Rosli Sharif had then asked him to resign on 26 March 2015.

[16] He was then offered an alternative by En Ghaus bin Omar that he should apply for his optional retirement which he was entitled to by virtue of his employment contract and with his long service.

[17] He was told that he had to take this option as he could no longer continue his employment and disciplinary proceedings will be instituted against him and he will be dismissed from the company and lose all his retirement benefits.

[18] The applicant then had no other option in view of the cumulative pressure placed on him and the fear of losing his job without his entitlement as he would not be able to support his family.

[19] Thus he had no option but to give his letter of resignation applying for optional retirement with three moths notice.

[20] This however was rejected by En Rosli Shariff who had said that "why would they want to keep him for another three months"?

[21] Thus, he was forced to prepare another letter requesting for immediate termination on 27 March 2015 with his last date being on 31 March 2015 which is after four days.

[22] The applicant subsequently then wrote to the second respondent highlighting the action of his superiors En Rosli Shariff and En Ghaus bin Omar and requested for reinstatement and was willing to return the retirement benefit payment of RM210,279.10 received if reinstated which was rejected by the second respondent.

[23] The applicant then made his representation to the Industrial Relation Department. However, the Minister on 20 January 2016 had decided that the matter should not be referred to the Industrial Court.

[24] The applicant submitted that the application should be allowed based on the following grounds:

(i) The Minister misinterpreted the law by failing to appreciate that forced resignation is a termination without just cause and excuse;

(ii) The Minister failed to appreciate and misinterpreted the law that the applicant's representation is premised on forced resignation which is a constructive dismissal and representation based on constructive dismissal has to be referred to the Industrial Court as per the Court of Appeal decision in *The Hon Minister For Human Resources v. Thong Chin Yoong & Another Appeal* [1999] 4 CLJ 161; [1999] 3 MLJ 257 and *Harpers Trading (M) Sdn Bhd lwn. Lee Fook Kiong & Yang Lain* [2006] 1 CLJ 289; [2006] 2 MLJ 443;

(iii) The applicant's representation is not perverse, frivolous nor vexatious;

(iv) There are substantial dispute of facts that has never been expressly denied by the second respondent and must be referred to the Industrial Court for adjudication;

(v) Significant failure to consider and examine material relevant facts and considering irrelevant facts; and

(vi) That the retirement benefit payment of RM210,297.10 does not bar nor prohibit the applicant's representation to be referred to the Industrial Court.

Issue

[25] This case involves a challenge by the applicant to the decision of the Minister on the following grounds:

(i) whether the Minister failed to appreciate and misinterpreted the law that the applicant's representation is premised on forced resignation which is a constructive dismissal;

(ii) whether the applicant's representation is perverse, frivolous nor vexatious;

(iii) whether the Minister failed to take into account all relevant facts;

(iv) whether the retirement benefit payment of RM210,297.10 prohibits the applicant's representation to be referred to the Industrial Court;

Whether The Minister Failed To Appreciate And Misinterpreted The Law That The Applicant's Representation Is Premised On Forced Resignation Which Is A Constructive Dismissal

[26] The Honorable Minister in his affidavit in reply *inter alia* averred the following:

> Saya mendapati tiada unsur-unsur paksaan untuk Pemohon berhenti kerja, sebaliknya saya mendapati Pemohon telah membuat Permohonan untuk bersara awal/pilihan dengan menghantar 2 surat.

[27] The second respondent submitted that the Minister had duly considered all the relevant facts and the reasons advanced and/or relied by the parties declined a reference of the applicant's representation to the Industrial Court on the basis that it was "not fit". In doing so, he had acted within his discretion and in accordance with the 1967 Act, wherein the threshold jurisdiction of the Minister under s. 20 only arises when there is a 'dismissal' only.

[28] It was contended for the respondents that in the present case, the applicant left the second respondent on early retirement. In support of the second respondent's contention, learned counsel relied on the Federal Court's case in *Zainon Ahmad & Ors v. Padiberas Nasional Bhd* [2012] 8 CLJ 29 where it was held as follows:

> [15] We are inclined to express the same view. More so in the present case since the undisputed fact shows that the plaintiffs had exercised their option under the VSS and accepted the amounts payable thereunder. As such the contention of the plaintiffs that they are entitled not only to receive the termination benefits under the VSS but also the termination benefits under cl. 5.5 of the "Buku Panduan" is obviously misplaced. We are of the view that the VSS scheme is a separate and independent contract intended to mutually override and terminate an existing contract of employment. The two contracts do not co-exist. Otherwise the very objective of VSS as adumbrated in *AK Bindal (supra)* is defeated. A contract which is rescinded by agreement is completely discharged and cannot be revived. It is certainly not intended that after the employee leaves under the VSS, the employee can still return to ask for other benefits under the terms of his contract of employment. Thus, we find the plaintiff's contention that the termination benefits are still intact and ongoing after such rescission, with respect, is misconstrued.
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> …
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> [18] It is our view that under VSS the employees have the option to accept the said scheme or continues to work as before. Therefore, once the said option has been exercised by the employees, the question of it being unfair does not arise. To us an employee who on his own will, accepts the benefits of the VSS, resigns, signs a full and final settlement and walks away cannot then turn around and ask for any other benefits.

[29] In my view, with respect this ground alone is sufficient to allow this application as the Minister has clearly overstepped his jurisdiction by making a finding to reject the plaintiff's representation on merits.

[30] In my view, whether or not an employee was constructively dismissed is a question of law which is not the province of the Minister to decide. The Industrial Court is the best venue to decide this question. In the proper exercise of his discretion, the Minister ought to have referred the applicant's representation to the Industrial Court to decide on its merits. Therefore, the Minister had failed to fully appreciate the scope of his discretion under s. 20(3) of the Act, when he declined to refer to the Industrial Court. (*The Hon Minister For Human Resources v. Thong Chin Yoong & Another Appeal* [1999] 4 CLJ 161; [1999] 3 MLJ 257 followed)

Whether The Applicant's Representation Is Perverse, Frivolous Nor Vexatious

[31] Learned counsel for the applicant submitted that the applicant's representation is neither perverse, frivolous nor vexatious and therefore the Honourable Minister ought to have refused the dispute to the Industrial Court. In my view the following material facts shows that the application is not perverse, frivolous nor vexatious.

(i) the applicant was employed with the second respondent a total of 29 years;

(ii) there is no dispute prior to the incidents of 2015 (Rosli Shariff commenced employment as his superior in February 2015), the applicant has dutifully and diligently discharged his duties as the second respondent's employee;

(iii) there is no dispute that Rosli Shariff and Ghaus Omar were his superiors;

(iv) there is no affidavit in reply by any Rosli Shariff or Gahus Omar to dispute all the allegation of pressure and coercion by them. In *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609; [1995] 1 MLJ 281 the court held that:

> In evaluating affidavit evidence, where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted.

(v) that the applicant's application on 19 March 2015 had applied for a transfer out of the department as the manager of Bernas Careline which was denied;

- This was never specifically denied by the second respondent.

(vii) that after one week on 26 March 2015, he was tendered the letter of resignation by applying for optional retirement by giving three months notice;

- The applicant after his transfer being rejected was told by En Ghaus Omar that he should resign by applying for optional retirement which he was entitled to by virtue of his employment contract and with his long service and he had to take this option as En Ghaus bin Omar and Rosli Shariff had told him that he could no longer continue his employment and disciplinary proceeding will be instituted against him and that he would be dismissed from the company and lose all his retirement benefits.

(viii) it is undisputed by all parties that the application's notice period for resignation is three months.

(ix) the next day 27 March 2015, the applicant tendered a fresh letter of resignation by applying for optional retirement with four days notice on 31 March 2015.

- The applicant have posed and challenged the second respondents whether it was normal procedure not even acceptable for the applicant to resign by way of optional retirement within four days notice but the second respondent have failed/refused to answer the challenge posed;

(x) the application for optional retirement was immediately approved.

- The applicant had posed and challenged the second respondents whether it was possible for optional retirement to be approved so expeditiously but the second respondent had failed/refused to answer the challenge posed.

[32] It must be stressed upon that the above material fact shows that there is a dispute on the question of fact whether the applicant resigned voluntarily or it was a forced resignation.

[33] These disputed matters are certainly not frivolous and vexatious and are not within the purview of the Minister to decide.

[34] Upon an objective examination of the facts before the Minister, I find that the Honourable Minister's affidavit shows that a reasonable person similarly circumstanced would not have arrived at the same decision as the Minister had acted based on the facts.

Whether The Minister Failed To Take Into Account All Relevant Facts

[35] The affidavit of the Minister shows that the following facts were not taken into account:

(i) that the application on 19 March 2015 (one week prior) had applied for a transfer out of the department as the manager of Bernas Careline which was denied;

(ii) that the applicant was subjected to internal audit with Puan Normala Hassan of Bernas Internal Audit and was informed that there was no problem with his employment and cleared from any allegation of wrongdoing;

(iii) that there were two letters of resignation within 24 hours which clearly shows the resignation was coerced and the applicant was forced to terminate his employment within four days after 29 years of service.

Whether The Retirement Benefit Payment Of RM210,297.10 Prohibits The Applicant's Representation To Be Referred To The Industrial Court

[36] The first respondent's affidavit in reply shows that the first respondent was heavily influenced by the issue of retirement benefits paid as a pertinent factor in not referring the representation.

[37] In the case of *James Clement Hii Gin Kion v. Menteri Sumber Manusia & Anor* [2015] 3 CLJ 234, the court held as follows:

> (1) It is the duty of the Industrial Court in a reference under s. 20 of the IRA to determine whether or not, firstly, there was a termination and secondly, if so, whether the termination was for just cause and excuse. Therefore, the question of whether or not the applicant was justified in refusing to accept the PIP which eventually led to the compensation package being paid to him in return for him leaving the employment of the second respondent and the concomitant question of whether under those circumstances there was a termination of employment as contended by the applicant were matters within the sole competence of the Industrial Court. It was not for the first respondent to delve into the merits of the case in order to determine the matter.
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> (3) The fact that the Industrial Court chooses not to grant reinstatement but compensation in appropriate cases does not detract from the fact that the primary remedy is reinstatement. Should the Industrial Court eventually find that the termination was without just cause or excuse, being a court enjoined to act according to equity and good conscience, in assessing any compensation due to the applicant, without doubt will have due regard to any monies paid and the appropriate deduction would be made for the compensation already received. Therefore, the fact that the applicant accepted the compensation from the second respondent does not in any way prevent or bar him from seeking the remedy of reinstatement from the Industrial Court.

[38] The Court of Appeal in *Swedish Motor Assemblies Sdn Bhd v. Haji Mohd Ison Baba* [1998] 3 CLJ 288; [1998] 2 MLJ 372 which had the same facts and a forced resignation scenario, held that the fact that the applicant has accepted compensation and by applying the principle of estoppels, cannot be used to defeat his claim.

[39] In light of the principles cited above, I am of the view that the fact that the applicant accepted the compensation from the second respondent does not in any way prevent or bar him from seeking the remedy of reinstatement from the Industrial Court.

Conclusion

[40] In conclusion, the first respondent should not replace the position of the Industrial Court to evaluate the merits of the representation but only to consider whether the representation is perverse, frivolous or vexatious.

[41] It is the Industrial Court and not the first respondent that is clothed with the jurisdiction and power to hear and adjudicate the reference and being a court of equity and good conscience is the appropriate forum to hear the evidence of all the parties and make a fair and appropriate decision.

[42] Accordingly, the application is allowed with costs of RM5,000.